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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1325

ESTATE OF CHARLES NATHAN, ROSE N. STRAUS, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The prevailing (R. 31–33) and dissenting (R. 33–34) opinions in the Tax Court are reported at 6 T. C. 604. The opinion of the Circuit Court of Appeals (R. 51–56) is reported in 159 F. 2d 546.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 11, 1947. (R. 57.) The petition for a writ of certiorari was filed on May 5, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent in 1941 created a trust in which his sister was named life beneficiary. The trust provided that if the decedent survived his sister, the trust income was to be paid to him during his life. Upon the death of the decedent and his sister there were remainders over. The decedent died in 1943 during the lifetime of his sister. The question is whether there should be included in the gross estate for purposes of the federal estate tax, under Section 811 (c) of the Internal Revenue Code, the value of the trust corpus, minus the value of the sister's life estate.

STATUTE AND REGULATION INVOLVED

These are set out in the Appendix, *infra,* pp. 13–14.

STATEMENT

The Tax Court found the following facts (R. 29–31):

The decedent, on December 23, 1941, created a trust wherein his sister, Rose Straus, was designated as the primary or original beneficiary. (R. 29.)

The trust agreement contained the following provisions (R. 29–31):

> 2. The entire net income from the trust estate, commencing at the date hereof, shall be paid to Rose Straus, the sister of the donor, for and during her natural life

for her sole use and benefit, in installments as hereinabove stated. In the event, however, of the said Rose Straus predeceasing the said donor, Charles Nathan, then and in such event the net income shall be paid over by the trustees to the said donor, Charles Nathan, for and during his natural life for his sole use and benefit, in installments as hereinabove stated.

3. Immediately upon the death of the said Rose Straus and Charles Nathan, any income which accrued prior to the death of said Rose Straus or Charles Nathan, and which was not paid over to them or to the survivor of them, as herein provided, during his or her lifetime by the trustees, shall become part of the corpus of the trust estate, and the said trustees shall divide said trust estate into two (2) equal shares or portions, and shall hold said shares or portions in trust, as hereinafter provided:

* * * * *

The decedent died on April 11, 1943. His sister Rose Straus, survived him. (R. 31.)

The Commissioner determined that the value of the corpus of the trust, less the value of the life estate of the decedent's sister, Rose Straus, which preceded the right to receive the income from the property retained by the decedent, is includible in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code as a transfer in contemplation of death and as a

transfer under which the decedent retained for his life or for a period not ascertainable without reference to his death, or for a period which did not, in fact, end before his death, the possession or enjoyment of or the income from the property. (R. 12–13, 31.)

The Tax Court found that the transfer was not made in contemplation of death (R. 31) and no appeal was taken as to that issue.

The Tax Court also held (R. 33), three judges dissenting (R. 33–34), that the decedent's contingent reservation of the income for life did not make the transfer taxable under Section 811 (c), and that is the issue with respect to which an appeal was taken. The Circuit Court of Appeals reversed. (R. 56.)

ARGUMENT

The Circuit Court of Appeals held, correctly, we submit, that the value of the trust property, less the value of the sister's outstanding life estate, is includible in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code (Appendix, *infra*) which provides specifically for the inclusion in the grantor's gross estate of trust property, donatively transferred, where he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death the possession or enjoyment of, or the right to the income from, the property.

These specific provisions came into the law by amendments passed in 1931 and 1932. While they are not retroactively applicable to transfers made prior to their enactment (*Hassett* v. *Welch*, 303 U. S. 303), they are valid as to subsequent transfers (*Helvering* v. *Bullard*, 303 U. S. 297). The instant transfer was made in 1941, and it is therefore subject to the amendments.

Since the instant decedent retained the right to the trust income for his life if he should survive his sister, the first life tenant, we believe it necessarily follows that he reserved the right to the income for a period in the ascertainment of which the date of his death was a necessary element, and therefore the transfer is within the scope of the statute. The decision of the Circuit Court of Appeals below is in harmony with that view and so are the various regulations issued from March 18, 1937, to date. See Article 18, Treasury Regulations 80 (1934 ed.), as amended by T. D. 4729, 1937–1 Cum. Bull. 284, 285, approved March 18, 1937; Article 18, Treasury Regulations 80 (1937 ed.), approved October 26, 1937; Article 18, Treasury Regulations 80 (1937 ed.), as amended by T. D. 4868, 1938–2 Cum. Bull. 355; Section 81.18, Treasury Regulations 105, Appendix, *infra*.

Article 18 of Treasury Regulations 80 (1934 ed.) as originally promulgated was silent as to this situation, but a ruling made in 1934 (E. T. 5, XIII—2 Cum. Bull. 369), provided (p. 371)

that if the transferor was at the date of his death in the actual enjoyment of the income of the trust, the transfer should be subjected to tax; and, where the transferor's contingent right to the trust income was obliterated by his death prior to that of the life tenant, the transfer is not taxable. However, that ruling did not have the force and effect of a Treasury Regulation (*Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 468), and in any case it has long since been superseded by the regulations above referred to; it should therefore be disregarded here.

As noted by the Circuit Court of Appeals below (R. 53) the case of *Estate of Curie* v. *Commissioner*, 4 T. C. 1175, upon which the taxpayer relies (Pet. 15, 23–25) is distinguishable because there the transfer which the Commissioner was seeking to tax had been made in 1935 and the decedent's death occurred in 1936; and at both of those dates E. T. 5, which ruled against the tax, was in effect. In the instant case, on the other hand, the transfer was made in 1941 and the decedent died in 1943, and the regulation in effect at both of those dates provided for taxation in such cases.

We submit that the present administrative interpretation, being reasonable and consistent with the statute (*Manhattan Co.* v. *Commissioner*, 297 U. S. 129, 134), should be upheld and that the majority of the Tax Court in rejecting it (R. 33) committed a serious error, which the Circuit

Court of Appeals properly corrected by reversing the Tax Court's decision. Here the situation is not unlike the ones in *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, and *Helvering* v. *Reynolds*, 313 U. S. 428, where this Court held that the administrative interpretation can be changed prospectively through exercise of appropriate rule-making powers.

The Committee Reports on the 1932 amendment (H. Rep. No. 708, 72d Cong., 1st Sess., pp. 46–47 (1939–1 Cum. Bull. (Part 2) 457, 490–491); S. Rep. No. 665, 72d Cong., 1st Sess., pp. 49–50 (1939–1 Cum. Bull. (Part 2) 496, 532), support our views. They read in part as follows:

> The purpose of this amendment to section 302 (c) of the revenue act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect.
>
> The changes are:
>
> (1) The insertion of the words "or for any period not ascertainable without refer-

ence to his death," is to reach, for example, a transfer where decedent reserved to himself semiannual payments of the income of a trust which he had established, but with the provision that no part of the trust income between the last semiannual payment to him and his death should be paid to him or his estate, or where he reserves the income, not necessarily for the remainder of his life, but for a period in the ascertainment of which the date of his death was a necessary element.

(2) The insertion of the words "or for any period which does not in fact end before his death," which is to reach, for example, a transfer where decedent, 70 years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. This is a clarifying change and does not represent new matter.

(3) The insertion of the words "the right to the income" in place of the words "the income" is designed to reach a case where decedent had the right to the income, though he did not actually receive it. This is also a clarifying change.

We submit that the instant case is one where the decedent reserved the right to the income for a period in the ascertainment of which the date of his death was a necessary element, and the

regulations have been in harmony with this view for the past ten years.

It is true that the Committee Reports do state that the insertion in the statute of the words "or for any period which does not in fact end before his death" was designed to reach, for example, a transfer where decedent, seventy years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. But as pointed out in the dissenting opinions in the Tax Court (R. 33–34), that language has no bearing upon whether this case is covered by the other clause which deals with transfers where there is a reservation "for any period not ascertainable without reference to his [the grantor's] death." And here there was clearly such a reservation.

Moreover, it will be remembered (see *Hassett* v. *Welch, supra,* p. 309) that the specific amendments here involved are an adjunct to the broad general provisions taxing transfers intended to take effect in possession or enjoyment at or after the grantor's death, and they were expressly designed to overcome the effect of *May* v. *Heiner,* 281 U. S. 238, and other cases following it (*Burnet* v. *Northern Trust Co.,* 283 U. S. 782; *Morsman* v. *Burnet,* 283 U. S. 783; *McCormick* v. *Burnet,* 283 U. S. 784). The life estate in *May*

v. *Heiner* was apparently a contingent one (see 281 U. S. 238, 243), and it seems highly improbable that Congress in amending the law did not intend to cover cases of the very sort considered in *May* v. *Heiner*. Certainly it is plain that where as here the grantor of a trust reserves a contingent life interest in the trust income, the ripening of full dominion over the property by the remainderman is necessarily postponed until after the grantor's death.

In the application for certiorari, the taxpayer does not contend that there is a conflict of decisions in the Circuit Courts of Appeals, but urges (Pet. 4–5) that the question involved is important and the decision of the Circuit Court of Appeals is wrong. The taxpayer says (Pet. 10) that there was no possibility that the corpus would revert to the grantor in the instant case and we agree; but that does not preclude taxation by virtue of the specific amendments for they do not depend upon the existence of a possibility of reversion. The arguments on pages 10–20 of the petition for certiorari are discursive and largely beside the point, which is, as above stated, whether the reservation by the grantor of the contingent interest in the trust income amounted to a reservation of the right to the income for a period not ascertainable without reference to the grantor's death within the meaning of the statute. Indeed, it will be noted that the taxpayer relies (Pet. 12–13) upon the reasoning in *Helvering* v. *St. Louis*

Trust Co., 296 U. S. 39, to support her position here, and of course that reasoning was repudiated when this Court specifically overruled the *St. Louis Trust Co.* case in *Helvering* v. *Hallock*, 309 U. S. 106.

The taxpayer intimates without citation of authority (Pet. 25) that the grantor's contingent life estate could have been terminated during his lifetime by joint action of his sister and the trustees. This contention appears to be interjected into the case for the first time here and it is not discussed by either of the courts below. It is based upon a provision in the trust instrument (R. 23) giving the sister power to alter or amend the trust agreement with the consent of the trustees. It would seem that this power contemplated such changes in administration as might be necessary or appropriate to carry out the donor's intent, and it is indeed doubtful whether it could have been exercised so as to terminate the grantor's retained interest (cf. *Helvering* v. *Stuart*, 317 U. S. 154, 164). In any event, no attempt was ever made to deprive the grantor of his retained interest and so long as he had it nobody except his sister could enjoy the income until after he died. Cf. *Goldstone* v. *United States*, 325 U. S. 687, 692–693. And her outstanding interest has been excluded in determining the tax. See *Fidelity Co.* v. *Rothensies*, 324 U. S. 108, 112, 113.

CONCLUSION

The decision is correct; there is no conflict; and the petition for certiorari should be denied.

Respectfully submitted,

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JUNE, 1947.

APPENDIX

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth * * *.
>
> (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

> SEC. 81.18. *Transfers with possession or enjoyment retained.*—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 811 (c)) all property transferred by the decedent,

whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10:30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate. (See section 81.15.)

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